

January 22, 2016

VIA E-MAIL

Attorney General Maura Healey
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Re: DraftKings, Inc.'s Comments to Proposed Regulations 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts

Dear Attorney General Healey:

On behalf of our client DraftKings, Inc. ("DraftKings" or "Company"), we submit the following comments to the proposed regulations, 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts, issued by the Office of the Attorney General ("Attorney General" or "Office").

Founded in 2012, DraftKings provides fantasy sports enthusiasts a platform to participate in fantasy sports contests on a daily or weekly basis. With over two million registered consumers, the Company has significant experience with the topics addressed in the proposed regulations. As currently operated, DraftKings will be subject to the proposed regulations when finalized.

DraftKings is a dedicated consumer-focused company. There is much in the proposed regulations the Company finds consistent with its own philosophy of best practices. The Company respects the Office's commitment to ensure Massachusetts consumers have basic protections regardless of their choice of platform to participate in daily fantasy sports contests.

The comments on specific proposed regulations set forth below are based on the Company's operational knowledge, its consumers' experience using the DraftKings platform, and the Attorney General's authority to enact regulations that are rationally related to preventing possible unfair and deceptive trade practices. See *Purity Supreme, Inc. v. Atty. Gen.*, 380 Mass. 762, 778 (1980).

A. 34.04(3) – No DFS Games Based on College Sporting Events

Currently, Massachusetts consumers can participate in fantasy contests involving college sports, but not high school or other amateur student sporting events on the DraftKings platform. This is a business decision driven by consumer demand. Other than the fact that the contests involve collegiate sports, college sports contests are no different than other contests permitted by the proposed regulations. There is no apparent unfair or deceptive trade practice that exists to ban a certain contest that has the same characteristics as contests that are permitted. Any authorized regulatory framework to protect consumers who participate in college sports fantasy contests is exercised in the proposed regulations applicable to all contests. As such, there should be no regulatory intrusion into an otherwise legitimate business decision.

In the event this proposed regulation is not stricken, there is a benefit to clarifying the scope of the contests to be banned by inserting the word “amateur” in front of student as some professional athletes are also students.

B. 34.05(2) – Protections for DFS Accounts

While the regulatory objective to protect consumer accounts against financial events not under their control is sound and consistent with Company practices, requiring the formation of a legal trust would place an unnecessary burden on the Company, without a matching benefit for consumers. To the extent the regulation proscribes only one method to protect consumer accounts, the Company submits that consumers are as well served by providing an entity subject to the proposed regulations (“covered entity”) flexibility on structuring those protections that may allow easier access to funds by consumers and at lower costs.

C. 34.05(6) – Account Closures Due to Inactivity; Unclaimed Funds in DFS Consumer Accounts

DraftKings is subject to state unclaimed property laws applicable to specific consumer accounts. Any regulation regarding unclaimed property should only be applicable to Massachusetts consumers to the extent Massachusetts unclaimed property laws are applicable. Additionally, the proposed regulation can be read to conflict with Massachusetts’ unclaimed property law to an extent that it would be impossible to comply with both the proposed regulations and existing law. See G.L. c. 200A. For compliance consistency, DraftKings proposes the following changes to subsections c and d of proposed regulation 34.05(6):

- (c) In the event that funds in a closed DFS Consumer account cannot be refunded, remain unclaimed, and are subject to G.L. c. 200A, Disposition of Unclaimed Property, the DFSO will provide notice of the existence of funds to the DFS Consumer in accordance with G.L. c. 200A.
- (d) In the event that funds in a closed DFS Consumer Account cannot be refunded, remain unclaimed by the DFS Consumer, and are subject to G.L. c. 200A, such funds will be paid by the DFSO to the Commonwealth of Massachusetts Unclaimed Property Fund in the Office of the State Treasurer in accordance with G.L. c. 200A.

D. 34.06(4) – Termination of Players Who Establish More than One Account

The regulatory goal of preventing one consumer from having more than one account is a laudatory goal. However, experience demonstrates that consumers sometimes attempt to open second accounts for a variety of reasons—because they lost their password or by accident. As written, the regulation would ban consumers who create more than one account from participating on a DFSO platform when no fraudulent intent was involved, which seems to be a harsh outcome. We respectfully request that the Office revisit the language of this regulation so as not to punish innocent or unintentional attempts by consumers to open a second account when they already have one.

E. 34.06(5) – Simultaneous Log-ins

This proposed regulation results in a burden to consumers by forcing a change in the manner many consumers employ with their communication devices and the Internet. Through its experience with millions of consumers, the Company is aware that consumers access the Company's portal through multiple means—smart phone, tablet, laptop, smart TV—and the consumer is often using those devices simultaneously. These consumers often do not log off the DraftKings smart phone application before logging on to the DraftKings website through their laptop. This modern technology is the way people interact with the Internet.

We understand that this proposed regulation is designed to prevent fraud (where different people are attempting to use the same account simultaneously). However, the Company respectfully suggests that there are other methods that are less intrusive to consumer participation activities and more effective, such as backend technology and detection methods, which are currently used by the Company.

F. 34.07(2) – No Depiction of Minors

This proposed regulation is unnecessary given proposed regulation 34.08(1), which prohibits advertisements targeted to minors. Prohibiting a certain location of an advertisement or the use of certain actors no matter how limited a role they play in an advertisement does not rationally relate, standing alone, to an unfair and deceptive trade practice. Entities subject to these regulations will understand the risk involved with creating advertising that could be deemed to violate proposed regulation 34.08(1) and act accordingly, without the need for further proscriptive limitations that can adversely impact advertising cost or creative content for protected commercial speech.

G. 34.07(3) – No Endorsement by Minors, College Athletes, Colleges, or College Athletic Associations

While the Company does not knowingly state or imply endorsement by minors, collegiate athletes, colleges, or college athletic associations, there are professional athletes who meet the definition of Minor in the proposed regulations, and thus would be barred from being endorsers under this regulation. This serves no apparent purpose in protecting against unfair and deceptive trade practices.

H. 34.07(4) – Advertisements to Include Information to Assist Problem Gamers

The ability of consumers to receive, comprehend, and utilize the information required under this proposed regulation is virtually non-existent in many modes of advertising that companies use in today's market. Advertisements on smart phone apps and browsers can take up only 1/8th of the screen of a smart phone. Some radio ads are as short as seven seconds. The Company proposes that for interactive advertisements, the landing page that the advertisement takes the consumer should contain the required information. For non-interactive advertisements, the required information should be available on the website or app the advertisement mentions.

I. 34.10(1) –Self-exclusion

Providing consumers with additional controls to customize their experience can have many benefits insofar as those controls are understandable and useful. This proposed regulation, as it

relates to setting “self-imposed loss limits,” is unnecessary and subject to multiple interpretations, making compliance with the regulation uncertain. The controls required under proposed regulation 34.10(1) and (2) permit consumers to:

1. Limit when the consumer can participate;
2. Limit the contests the consumer can enter based on contest fee;
3. Limit the number of contests the consumer can enter each week;
4. Limit the amount the consumer can deposit; and
5. Limit the amount of losses the consumer can sustain

If required, the fifth limitation leads to regulatory uncertainty and consumer confusion. For example, assume a consumer sets a loss limit of \$5. That same consumer enters two daily contests on the same day where the entry fee is \$5 each. The consumer does not win a prize in either contest and has now exceeded her loss limit. To comply with the regulation, must the Company prevent the consumer from entering the contests that might exceed her loss limit even though the loss limit has not been triggered? Must the Company refund any entry fees that exceed the loss limit once it was hit even though the consumer participated in the contests? Let us also assume that the same consumer has also already entered a \$5 contest for the following day and wins a prize. Must the Company void that consumer's entry because the loss limit was hit before the next contest or must the Company honor that entry because it was made before the loss limit was hit? If the Company must honor the entry, has the consumer still hit her loss limit triggering her exclusion from participating in future contests for the designated period or does the prize won counteract the loss limit already hit?

Under the proposed regulations, a consumer can achieve the objective of limiting losses through the use of the other required self-limitation controls.

The loss limit requirement standing alone without clarity will lead to consumer frustration and confusion and makes compliance uncertain—particularly where the same protections are being achieved through the other self-imposed limitations required by the proposed regulations.

J. 34.10(5) – Requests for Exclusion Made by Third Parties

Although the Company is prepared to comply with this proposed regulation as drafted, we note the public comments submitted on January 12, 2016 to the Attorney General's Office by the National Council on Problem Gaming (“NCPG”), regarding proposed regulation 34.10(5). Those comments merit discussion and consideration.

K. 34.10(6) – Limitation on Consumer Deposits

The \$1,000 per month deposit limit is arbitrary and unnecessarily low. Under this proposed regulation, the information consumers must provide to raise the deposit limit, “information, including income or asset information, sufficient to establish that the DFS Consumer can afford losses that might result,” is invasive for consumers and burdensome for covered entities. Instead, DraftKings proposes that the proposed regulation adopt the DraftKings' standard \$6,000 per month deposit limit. This standard limit, coupled with other important financial

safeguards, including the ability of consumers to set their own deposit limits, is sufficient to protect consumers who are in the best position to know their financial position and set their own limits.

L. 34.12(3) – No Gameplay by Athletes and Others Connected with DFS Contest Outcomes

This proposed regulation, as drafted, could be interpreted to hold a covered entity strictly liable any time an athlete otherwise prohibited from participating in a contest does so regardless of the covered entity's compliance with subparts (a), (b), and (c) and any other efforts made to prevent the athlete from participating. For this reason, we respectfully request the Office consider revising this proposed regulation by adding "knowingly" at the beginning of the first sentence between "will" and "allow" and adding the following sentence at the end of the first paragraph and before subsection (a): "By complying with the following, the DFSO shall be deemed to have met the requirements of this subsection."

M. 34.12(9) – Rules on When DFS Contests Lock

We respectfully request that the term "lock" be clarified to avoid an interpretation that would prohibit one of the Company's distinguishing features: the ability to allow participants to make changes to lineups for games that have yet to start. This unique characteristic is not unfair and deceptive and, in fact, is standard in most season-long fantasy sports products, which generally allow a consumer to edit their lineups until the underlying game begins.

N. 34.12(11) – Restrictions on Number of Entries by Contests

Implementing these entry requirements to all contests will harm a subset of consumers who expect and enjoy contests with high entry fees and more flexible entry limits. We respectfully request the Office consider a carve-out that excludes a limited number of contests with a high entry fee, \$150 or more, from the entry limitations in this provision.

O. Definition of Beginner

Providing new participants the opportunity to experience fantasy sports contests with other similarly situated consumers is a benefit for those consumers and is a concept the Company already provides. In fact, the Company provides beginner contests in each of the different sports that are permitted by its platform. Experience demonstrates that each sport presents unique challenges and requires unique skills. The proposed regulations unnecessarily limits the beginner consumer's ability to participate in beginner contests. The protections sought by this regulation are better achieved by allowing consumers to participate in up to 50 contests in each sport allowed by a covered entity, while excluding any consumer designated as a Highly-Experienced Player.

P. Definition of Highly-Experienced Player

Identifying Highly-Experienced Players can provide consumers relevant information if consumers clearly understand what the designation means. Based on its experience, the Company suggests that the definition be simplified and expanded as follows:

Any DFS player who has entered more than 500 contests offered by a single DFSO shall be classified as a Highly-Experienced Player.

Beginner players will benefit from the more expansive definition. By expanding the universe of Highly-Experienced Players as suggested, it virtually covers any other participant who would fall into proposed categories (2) and (3) and will make the implementation of the policy easier to explain, understand, and implement.

Q. Definition of Minors

The definition of minor in the proposed regulations should not include young adults aged 18-20. Massachusetts laws are replete with references that upon reaching the age of 18 one is treated like any other adult in the Commonwealth. See *e.g.*, G.L. c. 231, § 85O (“Any person who has attained the age of eighteen shall have full legal capacity to act in his own behalf in the matter of contracts . . .”); G.L. c. 231, § 85P (“ . . . any person domiciled in the commonwealth who has reached the age of eighteen shall for all purposes . . . be deemed of full legal capacity . . .”); G.L. c. 4, § 7 (“In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears . . . ‘Minor’ shall mean any person under eighteen years of age.”). There does not appear to be a rational basis related to protecting against unfair and deceptive trade practices to exclude young adults ages 18-20 from participating in daily fantasy sports contests, particularly when the proposed regulatory framework provides protections for all other adult consumers.

Even as a policy matter, there is nothing unique about this age group nor is this age group subject to any particular perceived risk warranting a regulatory ban. Young adults are accepting and taking consequential actions regularly and effectively: they participate in the political process by contributing time and treasure to voting; they protect our country by serving in the military (in 2014 the US Military contained 162,417 18-20 year olds enlisted and on active duty, comprising 14.9% of our country’s active enlisted force. See Population Representation in the Military Services: Fiscal Year 2014 Summary Report, Office of the Under Secretary of Defense, Personnel and Readiness, Appendix B, Table B-16, *available at* <https://www.cna.org/pop-rep/2014/appendixb/appendixb.pdf>); they have jobs, pay taxes, marry, and raise children; and they responsibly engage in and spend money for recreational activities whether it be gaming with an Xbox, purchasing a Red Sox ticket, or participating in fantasy sports contests. The Company is not aware that young adults are any more likely to have consumer issues with its platform than other age groups. To the extent the Office has policy concerns about young adults participating in fantasy sports contests, young adults will benefit from the same protections afforded in the proposed regulations as other adults.

R. Proposed Regulations Should Not Impose Strict Liability

As drafted, certain proposed regulations could be interpreted to hold a covered entity strictly liable for the actions of consumers or other third parties despite any and all efforts the covered entity takes to prevent the action by the third party. We respectfully request that when the Office is finalizing its regulations, it clarifies that a covered entity should not be held strictly liable for third party actions that result in conduct inconsistent with the regulation when the covered entity is meeting the other regulatory requirements designed to prevent the third party’s conduct. Additionally, it is possible that a covered entity could be deemed in violation of the proposed regulations through inadvertence or without bad faith. As such, the regulatory framework, particularly given the growth and changes occurring in the fantasy sports industry, should

include a provision that gives a covered entity an opportunity to cure alleged violations before an enforcement action is initiated.

S. Proposed Regulations Should Have a Delayed Effective Date

The Company recognizes the thoroughness and thoughtfulness with which the Attorney General has approached her evaluation of fantasy sports contests as enjoyed by tens of thousands of Massachusetts consumers, and the process the Office has engaged in to develop a regulatory framework for those consumers to continue to safely enjoy fantasy sports. The proposed regulatory framework, when finalized, may take some time to fully implement. As such, the final regulations should include a reasonable effective date.

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Thank you for your consideration of the Company's comments regarding the proposed regulations.

Sincerely,



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